CONSTITUTIONAL GOVERNMENT IN AMERICAN INDUSTRIES

By Wm. M. Leiserson

Chairman, Board of Arbitration, Men's Clothing Industry, New York

1. The Goal of Trade Unionism

". . . . The goal of trade unionism," wrote Professor John R. Commons fifteen years ago, "is the trade agreement. This implies the equal organization of employers and the settlement of a wage scale and conditions of work through conferences of representatives. The trade agreement must be distinguished from 'arbitration,' which, properly speaking, is the reference of disputes to an umpire. Far from being a simple solution of that kind, it is a form of constitutional government, with its legislative, executive and judicial branches, its common law and statute law, its penalties and sanctions."[1]

Ten or twelve years later, Professor Robert F. Hoxie, whose untimely death cut short some very fruitful studies of trade unionism, wrote in quite a different strain:

"There are in the United States today hundreds of union organizations, each practically independent or sovereign, and each with its own and often peculiar aims, policies, demands, methods, attitudes, and internal regulations. Nor is there any visible or tangible bond, however tenuous, that unites these organizations into a single whole. . . .

"Thus the scope and character of union ideals and methods have been as broad and diverse as the conscious common needs and conditions of the groups of workers entering into the organization. Some unions have confined themselves to attempts to deal directly with their immediate employers and their immediate conditions of work and pay; others have emphasized mutual aid and education; still others have enlarged their field of action to include all employers and all conditions—economic, legal, and social. . . .

"In short, there is unionism and unionism. But, looking at matters concretely, and realistically, there is no single thing that can be taken as unionism *per se*."[2]

Here we have two of our leading students of labor organizations differing completely regarding the fundamental nature of the subject matter with which they have to deal. One assumes that there is such a thing as unionism and that its goal is the trade

[1]Commons, J. R.: *Trade Unionism and Labor Problems, Introduction,* p. vii.
[2]Hoxie, Robert F., *Trade Unionism in the United States,* Ch. II, pp. 33, 35, 36, 37.

agreement. The other says there is no single thing that can be taken as unionism, but that there are distinct types of unions with different goals.

Hoxie proceeded to classify the different types. He mentions the structural forms that have long been recognized, i.e., craft union, industrial union, trades union or trades assembly, and the labor union. But he goes further and distinguishes four functional types of unionism which he names "business unionism," "friendly or uplift unionism," "revolutionary unionism," and "predatory unionism."

Commons does not seem to have elaborated his view of the unity of unionism with its single goal, and in the new edition of his *Trade Unionism and Labor Problems*, published this year, he has omitted the statement quoted at the beginning of this paper. However, in his *History of Labor in the United States*, published in 1918, we find repeated reiteration of the idea that the goal of trade unionism is the trade agreement.

"The ideal of the trade agreement was the main achievement of the nineties. It led the way from an industrial system which alternately was either despotism or anarchy to a constitutional form of government in industry".

"At present the trade agreement is one of the most generally accepted principles in the American labor movement. It is professed by the 'pure and simple' trade unionists and by the great majority of their socialist opponents. Those who reject it are a very small minority composed principally of the sympathizers with the Industrial Workers of the World."[3]

These divergent views of Professors Commons and Hoxie have been quoted at some length because they represent the main trends of opinion among American students of labor organizations. And we believe that the fruitfulness of future researches in the labor field will depend quite largely on clearing up this difference of opinion. Either the two views will have to be reconciled, or one of them must be proved erroneous. The two views are not even clearly distinguished, and some writers unconsciously change from one to the other, with natural confusion to their conclusions. Clear thinking requires that we shall know whether there is a unity in the labor organizations that we study, whether there is a normal trade unionism with a more or less conscious goal, or whether there is a multitude of unionisms with distinct

[3]Commons, J. R.: *History of Labor in the United States.* Vol. II, pp. 519 and 527.

types and distinct goals. Obviously, classifications, reasoning, and conclusions will differ greatly as we adopt the one view or the other.

Is Hoxie's "business unionism" any different from "revolutionary unionism" when both attend to business? The Amalgamated Clothing Workers of America is considered too revolutionary and bolshevistic to belong to the American Federation of Labor. It was supposed to have split from the conservative, business unionism of the United Garment Workers because its members were radical and revolutionary. But its entire growth and success has been characterized by the establishment of business relations and trade agreements with the employers in the men's clothing industry. Similarly, the International Ladies' Garment Workers, the International Association of Machinists, and, to some extent also, the United Mine Workers are radical unions, sometimes called revolutionary. Nevertheless, in so far as these organizations are successful in controlling conditions of employment and giving their members a voice in determining wages and working conditions, they accomplish these results only through trade agreements and business methods not essentially different from the business unionism of the stove molders, bottle blowers', printers', building trades' or railroad brotherhoods.

On the other hand, the development of craft trade agreements on the railroads has led naturally to coöperative action by all the brotherhoods, and there has been some joint action also with the railroad shop crafts. Thus the conservative railroad crafts developed a practical industrial unionism; and as this industrial unionism gave the wage-earners on the railroads more and more power, they found that profits and watered stock interfered with their efforts; so their business unions became revolutionary and they promulgated the "Plum Plan."

Then there are the two other functional types of unions: "friendly or uplift" and "predatory." Hoxie himself admits that any union may become predatory, but all students of the inside workings of revolutionary unions know that these, exactly like the business unions of the building trades and other crafts, at times become predatory, and levy tribute in the form of fines, graft, hold-ups, and vicious restrictive regulations, on both the employers and the industry.

As to the "friendly or uplift unionism," the history of trade unionism in this country shows that this is but an early stage in

the development of unions, when they are too weak to exert or even to assert their power over industry. Then they are like the wolf in sheep's clothing. They claim they are not organized for strikes, but only for mutual benefit and improvement of their skill. Just as soon as cost of living begins to go up, however, and this brings them more members and more power, we find them striking and acting in other ways like ordinary trade unions whether conservative or radical. They usually retain some insurance benefit and educational features, and most unions have these in one form or another. In a word, the so-called friendly or uplift unionism is but the ordinary unionism in its minority, before it has attained manhood, before its members are able to assert their right of citizenship in industry. Even when the employer himself organizes a friendly or uplift union to get rid of the regular trade union in the field, as in the case of the Interborough Brotherhood of the New York rapid transit companies, he finds it soon learns to go on strike and to act like the ordinary union.

We conclude, therefore, that the forms of trade unionism may differ; unions may emphasize different activities, they may espouse different theoretical ideals of future industrial relationships, and they may have different rituals either spoken or as preambles to their constitutions, to explain their activities; but essentially every union is the same; in the words of the Webbs, "a continuous association of wage-earners for the purpose of maintaining or improving the conditions of their working lives." This definition, as the Webbs themselves point out, does not imply the permanent continuance of the capitalist or wage-system.[5] The unions may aspire, as some of them have done, to a revolutionary change in the industrial organization of society, but as long as they function as trade unions, i.e., as long as they try to improve working conditions for their members, they act pretty much alike and are very much the same, even though emphasizing different ideal ends.[6] And almost inevitably all successful unions come to trade agreements.

[5]Sidney and Beatrice Webb: *History of Trade Unionism,* (revised edition) 1920, p. 1, and footnote.

[6]Organizations like the I. W. W., or the old Socialist Trade and Labor Alliance, often confuse economists because they are apparently trade unions for revolution only. But a careful study of such bodies will show that they are either political parties, and not trade unions at all—the test of membership being not whether a man is a wage-earner, but rather whether he believes in a certain platform, and if he does, even though a capitalist, whether he may be

2. Trade Agreements as Industrial Constitutions

In theoretical discussion some trade unionists travel very fast to socialism, communism, syndicalism, bolshevism, and even anarchism. In actual practice, however, if they are wage-earners trying to improve their conditions, they necessarily begin with their own shops, with wages and hours, rules and discipline.

They find that the employer has the absolute right to make and change these rules, and that before they can improve their conditions they must contest his power of shop control. This they can only do by maintaining a continuously functioning organization, which knows the conditions and the rules in the industry and which is strong enough to make the employer talk about those rules, discuss their reasonableness, and compromise when he finds that the wage-earners may veto his acts by going on strike. Thus government by discussion enters into industry (as it did in the state) when the ruler can no longer arbitrarily force obedience to his laws, and must get the consent of those who are to obey the regulations.

Then a parliament is set up, a talking place, if you please, in the form of periodical conferences or conventions of the employers and the wage-earners. The employers come to these meetings in their own right, as the lords of the industry, the wage-earners come by their representatives; so that a parliamentary form of government is organized with the employers acting as a sort of House of Lords and the union representatives as a House of Commons.

Every trade union, whether conservative or radical, business or revolutionary, whether organized on a craft or on an industrial basis, when it becomes strong enough to contest the power of the employers in the industry in which it operates, enters into joint conferences or conventions with them. Ordinarily it is the employers who refuse to meet the union representatives and they have to be forced to confer by means of a strike. Sometimes, however, when a union grows suddenly strong, it attempts to substitute its dictation for that of the employers. In such cases the latter usually shut down their plants, and thus the

a member; or, if it is made up of wage-earners, whether the numbers are insignificant, and the organizations have been created primarily by socialist or revolutionary politicians, not wage-earners, as tails to their politicial or revolutionary kites. Similarly, the so-called predatory and business unions are sometimes created or maintained primarily as adjuncts to bosses' political machines.

revolutionary unions are forced by the employers to hold conferences and jointly determine conditions of employment.

The condition that always brings these conferences about is the equalizing of bargaining power between the wage-earners and the employers. Each may veto the act of the other. And the result of these conferences is always the same, an agreement of some kind, verbal or written, which, because of the mutual power to veto, must necessarily be a compromise. The agreement lays down the conditions of employment, fixes wages and hours, stipulates rules of discipline and workmanship, provides for settlement of complaints and disputes, and for some form of judicial interpretation of the agreement.

We have, then, in these trade agreements nothing less than constitutions for the industries which they cover; constitutions which set up organs of government, define and limit them, provide agencies for making, executing, and interpreting laws for the industry, and means for their enforcement.

There are hundreds and hundreds of these agreements now operating in this country, and they cover, in part, rarely in whole, practically every industry in the country. Most of us are more or less familiar with these agreements, many of which have been studied and described in monographs. But these studies have usually been historical and descriptive. The real character of the agreements are not revealed however, by the external descriptions that have usually been given. Among them will be found agreements in all the stages of constitutional development that political scientists have found in the evolution of political constitutions. What they are, what they really do, what they mean and what they portend for industry and for society can be ascertained only by studying the kind and nature of the laws that they make for industry, by tracing the development of the organs of government that make and enforce the laws, and by following the growth and the shifting of power and sovereignty among the various groups and interests that make up the body politic of the industrial states which the trade agreements have set up.[7]

[7]Very little of this work has been done, and here is a field for labor research that is most promising of fruitful results for political economy as well as for the other social sciences. It promises us new knowledge not only on the most outstanding problem of industrial relations, but also on problems of distribution of wealth, government social psychology, and social evolution and revolutions.

It is primarily to direct attention to this field of research that the present

Many trade agreements, for example, contain clauses to the effect that the right of initiative in management remains with the employer, and he may make any changes in methods of work and use any machinery for manufacturing that he sees fit. But there is usually provision also for protection of workers against loss in wages or demotion or other injury that may result from such acts of the management. Here we have the establishment or recognition of the executive branch of industrial government, defining its power and describing its limitations.

Some agreements state that the power of discharge remains with the management, but it must be exercised with justice and with due regard for the rights of the workers; and that there must be no discrimination. Then provision is made for judicial review of discharges. And a few agreements provide for a trial before the employer may be authorized to discharge. Here again we have limitations on the right of the executive; and another limitation commonly made is that the employer must hire all his help through the Union employment office.

The legislative authority is rarely defined or described in these trade agreements. It is plain, however, that the legislative power lies in the joint conferences or conventions which frame the agreements; and the limitation on the power is that both employers and union must agree on the legislation, which is in effect that the law must pass a legislature of two houses.

The joint meetings of employers and union representatives, like the Parliament of England, are at the same time constitutional conventions and statute making legislatures. And just as this double character of the British Parliament has confused political scientists in their thinking and politicians in their activities, so the double character of the joint meetings which create trade agreements and revise them has confused economists in their theories and trade unionists in their policies.

So, most economists who have studied labor organizations commonly distinguish between trade agreements and arbitration. Commons calls the joint conferences "conciliation," which he says is quite different from arbitration which is decision by an umpire. This idea came originally, no doubt, from trade unionists and employers, both of whom do not like what they call

paper has been prepared, not to give the results of any such research. We may, however, outline the nature of some part of the field that is available for study and some of the problems that present themselves, as well as the methods of approach that are most promising.

"outside arbitrators." They have joint arbitration or grievance committees to settle disputes and interpret the agreements. But these consist only of representatives of the employers and the union; and this they name conciliation rather than arbitration.

But this distinction between conciliation and arbitration is confusing rather than enlightening. The attempt to settle all disputes within the industry is of course the soundest policy; but it should be recognized as an attempt to use in interpreting legislation the same method that is used in enacting legislation and in creating the constitution itself. The joint conferences, which meet annually or biennially to frame trade agreements, enact the fundamental constitutional law. New questions and new problems frequently arise, however, which have to be settled before the agreements expire. In the state these are settled by statutes enacted by the legislature. Under trade union agreements they are usually settled by the joint grievance or arbitration committees, which the agreements set up; and any rules adopted by such joint committees are really industrial statute law as distinguished from the constitutional law of the agreement.

It is plain that for all law, whether constitutional or statute, arbitration, i.e., decision by a third party, is unsound from a political point of view and dangerous from an industrial viewpoint. Conciliation or compromise between the legislative bodies is the sound basis. But when the question is not one of new legislation, but merely a matter of interpreting the law already in existence, and applying it to particular cases, then compromise and conciliation may prove dangerous. Even the delay in deciding such questions involved in the method of conciliation may cause temporary disruption of the agreement—as, for example, when illegal strikes or lockouts occur, as protests against delayed decisions. In all cases, therefore, which involve merely judicial interpretation of the agreement or the rules made under it, arbitration by a third party is not only a sound policy, it is well nigh inevitable. It is in the lack of a properly developed judicial department that the constitutional government established by trade union agreements shows its greatest weakness.

Most of the early agreements provided no other judicial machinery for interpreting the agreements than joint grievance or arbitration committees consisting of employers and union representatives. If local committees could not settle the cases, appeal

was provided to the presidents of the two national organizations which entered into the agreements. Old unions like the stove molders and the glass blowers still pride themselves on having no outside arbitrators and on their ability to settle all disputes among themselves. But most unions found that sooner or later they reached a deadlock, and because of this the vast majority of agreements now provide for arbitrators to be called in when the parties to the agreement cannot adjust their difficulties.

The experience with these outside arbitrators has been quite unfortunate. They usually are not familiar with the questions they have to decide, and quite often their own decisions are unsatisfactory, tending in a direction opposite to the development of the joint agreements. This has caused employers as well as unions to distrust arbitration more than ever and to avoid it whenever possible.

The arbitrators, like the employers and the unions, rarely distinguish between arbitration which is based merely on the arbitrator's opinion of what is fair and just, and arbitration which consists of judicial interpretation, by a third party, of the law made by the employers and the unions themselves. If the arbitrator or judge has only his own sense of justice to guide him, this kind of arbitration may well be distrusted and condemned; for it is government by men and not by law. Even though the man is an impartial arbitrator instead of an employer, his rule may be just as arbitrary. If, however, the judge or arbitrator is bound by the trade agreement or the law made by the workers and employers themselves, then, if he is an ordinarily honest and competent person, his decisions will represent not his own personal ideas of what is fair and just, but the sense of justice of the management and the workers in the industry, as embodied in the laws which they have jointly enacted. And such decisions may often represent more completely the will of the parties to the agreement when they made it than their own decision would be when they have the grievance of a particular case before them.

Arbitration that is thus bound by the law of the trade agreement can not be condemned as outside interference. On the contrary, it is absolutely essential to the proper working of all such agreements; for without impartial interpretation each party itself becomes the interpreter of the law. And because the parties interpret the same agreement differently, without any

means of resolving the differences, disruption often follows when one side or the other attempts to enforce its interpretation.

Although trade agreements were started first by conservative craft unions, it was the radical and revolutionary unions in the women's and men's clothing industry which added as a permanent feature to the trade agreement judicial machinery with a so-called impartial chairman to interpret and apply to all particular cases the constitution and the laws of the industry. And for laying the foundations of this system of industrial law and developing the necessary judicial machinery we are indebted very largely to the late John E. Williams, who was the chairman of the first Board of Arbitration set up by the Hart, Schaffner, and Marx labor agreement. He functioned also under the Protocol in the Cloak and Suit industry of New York, and his decisions have not only served as precedents for all subsequent impartial chairmen, but his technique in handling cases must ever be an essential part of any successful system of industrial arbitration.[8]

While constitutional governments are thus being organized and maintained in many American industries, with executive, legislative and judicial and administrative departments, it must be remembered that only those wage-earners are given rights of citizenship in industrial government who are organized and articulate through their union representatives. Thus the government established by a trade agreement is not necessarily a democracy. It may be an aristocratic government if only a small portion of the wage-earners in the industry are organized. In fact, this has usually been the case, the skilled mechanics only being covered by the agreement, with the majority, the unskilled and semi-

[8]His method was primarily that of a court of equity rather than a court of law; but, though acting as a judge, he functioned as the administrator of the law as much as its interpreter. In other words, he saw the duties of industrial arbitrators as much the same as those of a Workmen's Compensation Board or a Public Utilities Commission. Their functions are quasi-judicial, partaking both of a court and an administrative officer. He would not decide cases merely on the merits of the briefs or arguments of the parties, for it would not help the industry or either party to have the other party lose a case if it was right but happened to present its case poorly or had its arguments wrong. He would make investigations on his own initiative, get all the facts in the situation, and then decide on the basis of those facts regardless of what might have been presented or omitted in the argument of the case. In making these investigations he often consulted each party separately and in confidence. He found it necessary to do this to get the real truth in industrial cases, which as in ordinary law cases are often hidden by the trial. But it was also necessary at the same time to retain the confidence of both parties in his honesty and impartiality. He was able to accomplish both these things; and thus he laid the basis for a successful industrial jurisprudence.

skilled, left out. A strong employer has sometimes used these unorganized people against those who have achieved citizenship to destroy the industrial government and set up his absolute rule again. This happened in the steel industry when the agreements with the skilled mechanics were broken, and unskilled, unorganized workers under guidance of foremen were used to do the skilled work. And in this we have but repetition of the Tudor Kings of England using the common people against the nobles to re-establish absolute monarchy.

Such reversals, however, are only temporary. Soon the movement for a parliament and a constitution is resumed again, with the lower grades of workers included in the movement, as it was in the recent attempts in the steel and packing-house industries. And sooner or later constitutional government with a wider basis of citizenship in the industry is established. At first the tendency even under such a more democratic constitution is to give the skilled wage-earners, and those in strategic positions, more rights and greater privileges than the masses enjoy; but gradually the pressure of the numbers of unskilled establish equal rights before the law; and then the movement continues, all the wage-earners together as the Commons in industry getting more and more rights and power at the expense of the Lord of the industry. This, however, is a very slow process analagous to the years and years it has taken to extend political suffrage until every adult may have a voice in the state.

3. Development of Constitutional Law in Industry

We come now to the particular laws that are being developed under constitutional governments that have been set up in various American industries.[9]

When we want to study American constitutional law, we go not to the formal written constitution, but to the decisions of the highest interpreting authority, the United States Supreme Court, to tell us what the law really is. Similarly, the formal trade agreements between employers and unions throw little light on the real nature of the government and its powers, or the rights and privileges of the people within its jurisdiction. For this we have to go to the highest interpreting authorities.

[9]Here, too, it is not conclusions of research that we offer, but merely examples of the kind of material that may be found and the light they throw on the problems of labor and industrial management.

While most of the decisions of joint arbitration committees and impartial boards of arbitration are written down, little effort has been made to collect these decisions, or to digest and analyze them for the development of the law that they might show. This is a work to which graduate students might very profitably devote their doctors' dissertations. Fortunately for our purposes, however, there has recently been issued in mimeographed form a digest and classification of about a thousand decisions made by the judicial authorities set up by the agreements in the men's clothing industry of Chicago, of which Professor Millis of Chicago University is the chief justice. Since we are merely citing examples and not making an inductive study, most of our cases will be taken from this codification.

The first question to be considered in all governments is the scope of the government. Whom and what does it cover? Just as the power of the federal government of the United States over certain activities of citizens of states was questioned in our early history, so the power of the government set up by the agreements in Chicago over certain individuals was questioned early in its history. An employer refused to grant certain wage increases to label sewers and girls who sew on temporary tickets known as "jokers," claiming that these girls do not come under the agreement. The Trade Board which is the court of original jurisdiction ruled, however, that

> "....the Agreement covers all direct labor involved in the manufacturing process, that the groups specified in the agreement include all workers so engaged, (and that the joker sewers) were week-workers in the tailor shops and as such were entitled to an increase." (Case No. 4.) Of label sewing the Board said: "This work is part of the productive work required to produce the garment as ordered.... The character of the work, not the pay roll, vacation privileges, or place of work is decisive." (Case No. 15)
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> On the other hand, in a later case, (No. 388), the Board ruled that the office force and the stock keepers are outside of the agreement, and the law of the agreement may not be applied to them.

Perhaps the most important of this class of cases is a ruling which interprets the preferential shop clause of the agreement to imply that non-union workers as well as union members are covered by the agreement. If the occupation or operation is within the jurisdiction of the union, the Trade Board said, the wages and conditions established by the agreement apply to both non-

union and union workers. The decision implied, however, that this might not be the case under a closed shop. (Case 697)

So much for the *people* over whom the government has authority. A similar question soon came up with respect to the *work* that is covered by the agreement, and the ruling was that the agreement covers all men's and children's garments, even though the employer may have developed new styles not made when the agreement was signed, and even though these new styles are made by new sub-contractors. Said the Board:

"It matters not that new lines of these are taken on or how they are distributed....Work sent out to contract shops and then distributed under the name of (another firm) is covered by the agreement and must be made in union shops. It is obvious that to rule otherwise would be to open a loophole which would destroy the agreement in effect." (Case No. 15d)

Finally, upon this question of the scope of the industrial government, the Trade Board has rendered an "opinion that the Agreement sets out only those matters presented to the conference by one side or the other and agreed upon, and that in general other conditions and rights were to continue as before." (Case No. 6)

Next we come to the jurisdictions of the industrial courts, that is, the impartial boards. And here the tendency is for the board to assume jurisdiction in all cases and controversies. If the matter in dispute does not come under the agreement, then the Board makes a ruling to this effect, which leaves the employer free to act and the union must not interfere. (Case No. 590)

A contention that the Trade Board was without jurisdiction was made by an employer in a case involving discipline of members of the union for non-payment of dues. In this case the Board ruled it did have jurisdiction and the workers must make arrangements for paying dues. In another case it ordered that a worker who had been fined by the union could not be employed by the firm until he had paid the fine; although the fine was imposed for disobeying an order of a shop chairman, which order was contrary to that of the foreman. On this point the decision said that if the instructions of the union representative in the shop to the union members are contrary to the rules of the firm, the remedy is at hand, either in the form of discipline reserved to the firm under the agreement or by means of the Impartial Machinery. (Case No. 695)

The question of compulsory payment of union dues and fines is one of the best examples of how the employer's authority over his own business is restricted by the new government that is set up. He may be satisfied with his employee, who may have worked for him for many years and given most satisfactory service. But he is compelled to discharge the man until the union obligations are met.

In every constitutional government the representatives of the citizens are usually given special protection such as freedom from arrest while in the performance of their duties. Just so shop chairmen or union representatives in the shop attain a special status under practically all trade union agreements. They are not immune from discipline for wrongful acts, but whereas ordinary employees may be discharged or suspended by the employer for alleged wrong-doing, these representatives of the people can not be disciplined by such summary action, except in such extraordinary cases as when they have used violence. The rule is "that in cases of discipline involving shop chairmen they (employers) shall proceed by filing charges before the Trade Board, rather than by summary action." (Case No. 46a) Thus when a shop chairman was discharged for "an insolent attitude" he was ordered reinstated both as worker and as shop chairman, and the employer was informed that complaint against the union representative should have been made to the Trade Board. (Cases 642, 644). An elected representative must be tried and disciplined by the impartial tribunal not by the employer. (Case No. 610a)

While the ordinary employee may be disciplined by summary action of the employer, the trade agreement gives him also certain constitutional rights, privileges, and immunities of which he may not be deprived without due process of law. This is best illustrated in the clauses which most agreements contain limiting the employers right to discharge. Discharge from an industrial establishment is equivalent to expulsion from a political community. As long as a person may arbitrarily be exiled or deported from the community of which he is a part, he is subject to an autocracy or czarism. In industry, workers achieve citizenship when they are protected against such arbitrary action. Most agreements provide, therefore, that discharge shall be for cause only. The employer may suspend a worker, but if the latter feels he has been unjustly dismissed he may petition for a trial

and the arbitration board or joint grievance committee may reinstate him with pay for all time lost when the employer cannot show just cause.

Under the miners' agreements in Illinois a man was discharged for applying a vile epithet to the mine superintendent. It happened, however, that this was done in a barber shop and not in the course of employment at the mine. The joint arbitration committee unanimously reinstated the miner without referring it to any impartial person. The reasons are obvious—the agreement does not cover conversations in barber shops. Discharge cases for insults and abusive language come up frequently under all trade union agreements, but, where there is a permanent impartial court, the chairman is in a position to consider what the joint committee in this case did not do, that the miner and superintendent would hardly be able to work together after the insult. The impartial chairman would, therefore, write a decison reinstating the man and holding that discharge was unjustified under the agreement; but when the law was thus vindicated he would induce the union to find another job for the man.

This was not necessary, however, in the case of a workman who was discharged from a Chicago clothing shop because he was caught in a police raid on a gambling house. This discharge the Trade Board held to be "wholly unwarranted." (Case No. 849)

A clothing manufacturer in Chicago discharged a number of employees who were under sixteen years of age because of certain limitations imposed by law on the employment of minors between fourteen and sixteen years of age. The Trade Board ruled that such discharge was not for cause and the juvenile workers were reinstated. (Case No. 51)

In unorganized industries it is common to use the periods when work is slack to eliminate the less efficient workers. These are laid off or discharged and the best or the fastest workers are kept to do whatever work is available. When a trade agreement sets up a government in industry, obviously the constitution must protect the rights of all the workers who come within its jurisdiction, regardless of the speed at which they work or the efficiency of their performance. So, most agreements provide that in the slack periods work shall be divided as equally as possible among all employees. Of course a worker who is proved incompetent may be discharged, but the employer is not the sole

judge of competence. The wage-earner may have the question of his competence reviewed by a joint committee or by the judicial board.

Such a board, however, rules almost universally that when an employer has had a two or three weeks period during which to try out the worker, and he has chosen to keep him after this trial period, then it must be assumed that the employer has decided the worker is competent and he can not thereafter be discharged merely because he happens to be less speedy or less efficient than other workers. However, if the employee should become careless and do bad work after he has received fair warning, then his discharge is upheld.

We cannot go further into the cases of discharges, for merely to list the reasons for which dismissals are made would take many pages. But some men are reinstated with pay for time lost, and some without pay—the loss of wages during the period of suspension being considered sufficient punishment. When the employer has the facts to prove the justice of his discharge, reinstatement is denied, but often the Board will rule that discharge is too severe a penalty for the offense, and suspension for a short period or a fine or reprimand may be deemed sufficient. Sometimes the Board of Arbitration which is the appeal board will impose heavier penalties than the Trade Board.

"Case of R. C....., suspended for one week by Trade Board for insubordination and use of profane and obscene language to his superior officer,— is appealed by the company on the ground that the penalty is too light for the offense. They claim that the penalty should be discharge.

The chairman feels that the offense is a serious one as would tend to prevent the recurrence of the offense. He agrees with the Trade Board that the extreme penalty of discharge is too severe for the first offense, and also agrees with the company in its statement that a week's layoff in the summer time is hardly a sufficient deterrent, especially if accompanied by back pay for the excess idle time. He, therefore, decides that the suspension should extend two weeks, and that back pay should begin to run from (two days before decision)." (Decision Appeal Case No. 608, H. S. & M.)

The right to the job after illness is particularly important to wage-earners and a good deal of law has been developed under the trade agreements on this question. The Trade Board in Chicago does not lay down a rule with reference to how long a worker's place must be kept for him when he falls ill. No general rule, it says, can be laid down; for the cause of sickness, the length

of time employed, and the nature of employment should be given consideration. So in one case it refused to reinstate a man because he had been employed only four weeks previous to his illness and another man would have to be discharged to make room for him. (Case No. 162) But reinstatement was ordered in the case of another worker who was refused employment after illness on the ground that he did not notify the firm. The statement that he did not give notice was disputed, and the Board ruled that in such cases the benefit of the doubt should go to the worker. (Case No. 547)

On the other hand, it is held proper for a firm to fill the place of a worker who had been absent for three days without sufficient explanation, and with opportunity to communicate the reason for his absence. (Case No. 113) Under the agreement in the clothing industry of Rochester, N. Y., the time within which notification must be given is forty-eight hours, and this has been interpreted by the Labor Adjustment Board of that city to mean two working days from the time the worker was due in the shop. Thus a man who worked until noon on Saturday was within the law when he notified the firm Tuesday afternoon, and the employers' contention that the time expired Monday noon was not upheld.

Again in Rochester an employer tried to prove that a cutter who wanted his place back after a period of illness was incompetent. The board ruled that this charge should have been made before the absence due to illness, and the cutter was reinstated.

The wage-earner's job is protected not only against discharge but against transfer to other work with loss of earnings. The employer must have freedom of management, says the Chicago Trade Board, but it limits this to cases where no injury results to the worker. (Case No. 179) Thus when a man was transferred from one kind of work to another, at reduced wages, though this was the legal pay for the new work, restoration of former wages was ordered with back pay for lost earnings. (Case No. 443) But when a worker was transferred to another shop at a higher wage and later returned to his original place at his old wage, the Board ruled he might elect which of the two jobs he preferred. (Case No. 256)[10]

[10]The question is raised: "Can shop discipline be maintained when the employer's power to discharge is thus restricted, reviewed, and oft-times reversed?" This question is essentially the same as whether order can be maintained in a community not ruled by arbitrary police authority. The

Not only is the wage-earner protected in his job, against arbitrary discharge or transfer; he is also given a vested right in his work. A frequent complaint in slack times is that foremen are doing the work of the operators while these are laid off. This, of course, is the practice in unorganized industries, but under trade agreements the practice is commonly prohibited. Where, however, it is common for foremen to do some portion of the wage-earners' work, the rule of the Chicago Trade Board is generally followed:

"Let the previous practice control; let the foreman do the kinds of work he has in the past, but he must not do a larger proportion of the work....than he has in the past." (Case No. 23)

Sending work to non-union houses to get it made more cheaply is also prohibited and the Board of Arbitration on appeal upheld the rule that:

"Work may not be transferred from one firm to another for the sake of reducing costs, because it reduces the amount of work available for the firm's union workers. Therefore the Board grants the union's main petition. But the request for pay for work already sent out is denied." (Case No. 757a)

Turning now to the rights of the management, we find the Chicago Board ruling that workers must keep records of their production as ordered by the firm, and although it reinstated a number who were suspended for refusing to keep records, it punished them with loss of pay during the period of their suspension. (Case No. 503)

Cases involving the right to introduce improved methods and new machinery come up under almost all agreements, and while the freedom of the management in these matters is conceded, in many agreements there is the limitation that no worker directly affected shall suffer from such improvements.

".... There is nothing in the agreement which prevents the introduction of machinery for the purpose of saving labor and increasing efficiency, even though its introduction may reduce and displace the

wage-earner under trade union agreements is not immune from discipline, the only difference between him and those workers in unorganized industries is that the employer and his foremen and managers as well as the wage-earners are bound by disciplinary laws that the employers and the union have jointly agreed are just and fair. It sometimes happens that a union grows so strong that it refuses to make any joint agreement with employers, and dictates to the employer when discharges shall be made, just as the employer dictates when he can prevent his employees from maintaining a union. In such cases shop discipline is of course most difficult to maintain, just as it is in a non-union shop when jobs are plentiful.

hand workers usually employed in the affected section. But in fixing the scale of wages for the operating of such machinery, the board believes the company is restrained by the agreement, and by the precedents and practices hitherto obtaining, from reducing the earnings of the workers employed in the section below the average level of the standard provided for in the agreement.

The board bases this decision on the uninterrupted practice hitherto prevailing of not permitting any change in the process or operation to operate in such a manner as to reduce the earnings of the workers involved." (Decision of Board of Arbitration, H. S. & M. Nov. 23, 1916.)

If an operation is eliminated by an improved method, the displaced workers may not be discharged, but must be provided with places at their former rates of wages, it has been held by the Rochester Labor Adjustment Board. And similar rules are applied to men displaced by machines. But an objection of hand pressers, in the same market, to working on pressing machines because it split up their craft and each was pressing only a part of the coat, thus becoming less skilled, was overruled, as long as the former hand pressers were employed at the machines and received their former wages.

Abuses of the privileges of the management are punished in much the same way as workers are disciplined. Thus a foreman was ordered removed by the Chicago Trade Board for bribery of a shop chairman. (Case No. 154) And a forelady and an assistant foreman were removed for using abusive and improper language. (Cases No. 725 and 988) In another case a shop superintendent was fined $50 for assault on a worker. (Case No. 751)

These cases should suffice to illustrate the nature of the laws that constitutional government in American industries is developing. Most of the examples have been taken from an industry in which the legal process has been clear and the judicial machinery well defined. But in every industry where trade agreements are in effect decisions are constantly being made and precedents established which do not differ essentially from those we have cited. These decisions are more commonly made by a joint grievance committee, or by the presidents of the national union and the national employers' association, instead of by an impartial arbitrator; but they none the less define the powers of the management and the wage-earners in the industry, limiting the freedom of the executives and enlarging the rights of the workers. The

title to the industry remains in the hands of the stockholders, but the power to govern the human beings who make up the labor force of the enterprise is being taken out of the hands of the owners and managers.

This shifting of sovereignty in the industrial organization and the developing of industrial law which acompanies it, deserves first attention from students of labor questions. For in spite of the present temporary loss in membership and prestige by the trade unions, due to the industrial depression, there can be no doubt of their growing influence in the country. And, as we have tried to show, whatever their ostensible aims, all trade unions, when they gain power, tend normally to create a constitutional form of government in their industries, and present a legal development such as we have described.

4. Conclusions

Assuming that further researches in this field verify the observations here recorded and establish beyond dispute that trade agreements do create constitutional forms of government, then what conclusions may be drawn from such a development of constitutional law?

In the first place, industrial disputes and strikes appear in a new aspect when viewed from this angle. They appear not so much as interruptions of industry, but more as incidents in a long struggle for representation of labor in the government of industrial enterprises. And the settlement of such disputes becomes not so much a matter of establishing or maintaining peace in industry, but more a problem of dealing with that Mr. G. D. H. Cole has aptly characterized as the wage-earners' "encroaching control."[11]

What impresses the student of government in industry as well as in the state, is the constant insistence on the part of the subjects of absolute monarchs that the laws of the ruler be written down. Whether carved on stone by an ancient monarch or written in a Magna Charta by a King John, or embodied in collective agreement between a union and employer; the intent is the same, to subject the ruler to definite laws to which subjects or citizens may hold him when he attempts to exercise arbitrary power. And, as groups of the populace organize and gain power

[11]G. D. H. Cole, *Chaos and Order in Industry,* Chap. VII.

in the community, they keep on encroaching on the prerogatives of the monarch until every adult becomes a sovereign citizen.

We have already pointed out that the mere establishment of a constitutional government does not necessarily mean that it is a democratic government. It may be aristocratic, as when a comparatively small number of skilled mechanics are included under the agreement, and the unskilled majority are left without. Or it may establish an oligarchy when corrupt employers unite with corrupt union officials to exploit consumers and wage-earners alike. The latter are the exceptional cases, but the general tendency of constitutional development in American industries is apparently to repeat the history of constitutional government in the state. At first the number with a voice in the government is small, and gradually this is increased to include all adults.

While trade agreements do not necessarily establish democratic government in industry, but merely tend in that direction and make it possible, it appears also that some form of constitutional government similar to that created by trade agreements will be necessary under any system of industry that may be substituted for private capitalism. Government ownership, coöperative industry, socialism, syndicalism, or bolshevism must all meet the same difficulties that bring trade agreements into existence. For, however the form of ownership may change, there will ever[12] be, if not wage-earners, at least workers who must obey orders, and directors or managers with authority to issue orders. These occupational groupings develop different points of view among the people in the different groups; and those in the managerial group become psychologically unified into a social class with divergent views from those of the other who likewise achieve a consciousness of kind. Unless the two classes jointly embody their ideas of the rights and privileges of individuals in constitutions and laws, those who have the power to command will act arbitrarily or autocratically. But this is just the absolutism against which workers rebel whether the ruler is Burleson in a government post office, Gary in a capitalistic trust, or union officials acting as directors of a workers' coöperative enterprise. Even in bolshevistic Russia we are informed by an observer recently returned that the trade unions exist side by side with the soviets, and these

[12]"Ever" is a long time, and it is conceivable that a time will come when none will order and none will obey, but all will freely coöperate and all decisions will be unanimous. By "ever" we mean only until this happy state of affairs arrives.

unions complain that the soviet government does not consult them enough about its industrial management policies, just as unions in this country do against the capitalistic managers of privately owned industries.

But the mere fact that trade agreements establish constitutional government in industry and tend toward industrial democracy, will not make such arrangements survive if in competition with other forms of labor management and control they prove less efficient. It has been pointed out that an industrial establishment which has a national union to deal with is an imperfect form of industrial organization because the loyalty of the wage-earner is in the first instance to his national union rather than to the industrial enterprise of which he is a part.[13] As long as the trade union remains an outside body there can be no question that industries which have to deal with it are in an imperfect form of organization. But whether they sign agreements or not, few employers are free from the influences of trade unions. If, however, the union and its entire membership are established by the trade agreement as one of the organs of constitutional government in the industry, then have we not here the promise of a more unified and more perfect form of industrial organization than has hitherto obtained?

In recent years there has been a widespread movement among open-shop employers to establish employee representation plans, variously known as shop committes, industrial councils, or company unions; and the defect of divided loyalty between union and employer has been most frequently urged in defense of these plans. Whether company unions will prove a more efficient form of industrial government than trade agreements time alone can tell. It is obvious, however, that if these employee representation plans are mere frauds and give no real voice to the wage-earners in industrial government they cannot survive.

It is true that these company unions are formed to avoid recognition of the regular trade unions in the industry. But the fact that open shop employers find it necessary to develop substitutes for unionism, itself shows that the idea of a constitution

[13]MacGregor, D. H., *The Evolution of Industry*, p. 120. "The loyalty of the employee of a firm (if he is a union member) is due in the first instance not to his firm, but to his labor organization, and this prior claim stands out at once, when, on the occasion of a dispute between employer and employee, a third party steps in—the Trade Union organization—and takes upon himself the settlement of a question which has arisen within an organization of which the Trade Union secretary is in no way a member."

for industry is permeating their non-union employees. They merely attempt to control the movement by promulgating constitutions of their own. Some economists have scoffed at this movement in much the same way that trade unionists do on the ground that democracy cannot be handed down from the top. They have charged that the employees are often indifferent to the employers' industrial democracy plans, and that the representatives have to be hand picked. But were not the early parliaments in England similarly handed down to the people, and were not the burgher representatives from the towns hand picked? On this point Edward Jenks writes:

"Only by the most stringent pressure of the *Crown* were Parliaments maintained during the first century of their existence; and the best proof of this assertion lies in the fact that, in those countries in which the Crown was weak, Parliament utterly ceased to assemble. The notion that Parliaments were the result of a spontaneous democratic movement can be held by no one who has studied, ever so slightly, the facts of history."[14]

May not the constitutions of these employee representation plans and the decisions under them develop democratic governments and democratic law-making in much the same way that European parliamentary government has developed? History will not permit us to assume that there is but one road to democracy. The employers promulgate their own constitutions in the form of employee representation plans because there is insistent demand for representation in industry. If these plans fail to establish real constitutional government they will not survive in competition with an effective trade unionism. If they do survive it will be because these plans, although promulgated in the first instance by employers, also develop into a real constitution for industry similar to trade agreements. It is therefore important to study the rules and decisions made under the employee representation plans, along the same lines that we have here sketched for the study of union agreements, to see if here too sovereignty is shifting, and democratic constitutional government is being established.

The movement for more control by wage-earners over the conditions of their employement, over wages, hours, and shop rules has been going on for so long a time, and in so many industries and widely separated countries, that it can not be put down as

[14] *History of Politics*, p. 133.

a mere momentary claim of labor during a period of industrial unrest. In the words of Professor Cheyney:

"Such a continuous movement as this, so analagous to the movement for political democracy, so wide in its extent, can not be expected to stop short of some great epoch-making change. It obviously has all the characteristics of evolution in human society. It is part of the organic growth of the community."[15]

[15]Cheyney, E. P., "The Trend toward Industrial Democracy," *Annals of the American Academy,* July, 1920, p. 9.